THE HONOURABLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION NO. 13123 of 2006

Date: -06-2007

Between:

M/s Venkataraya Fibres Pvt. Ltd.
Rep. by its Executive Director,
Himayatnagar, Hyderabad.

… Petitioner

And:

The State of Andhra Pradesh,
Rep. by its Secretary,
Energy Department, Hyderabad and others

… Respondents

THE HON'BLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION NO. 13123 OF 2006

ORDER:

The petitioner is a private limited company incorporated under the provisions of the Companies Act 1956, in 1983. Its objects include generation of power using biomass. The petitioner is aggrieved by the respondents' insistence that the petitioner agree to a renegotiation of the price at which it would supply power to the 2nd respondent and by the refusal to supply "back power" till then. The petitioner seeks a direction to the respondents to forthwith supply back power and thereafter to purchase the power to be supplied by the petitioner *"at uniform*

rates that are being paid to other similarly situated companies in the State of Andhra Pradesh generating power using combustible bio-mass."

Since the advent of the industrial revolution, the consumption of energy has been increasing exponentially. The mainstay of the consumable energy has been coal and fossil fuels. These are fast depleting and non-renewable resources of the planet. This mismatch between the accelerating global consumptive need and the availability and potential of conventional resources engendered global concerns and led to a concerted search for alternate, non-conventional energy resources to supplement and perhaps supplant eventually the conventional resources for energy generation. India in harmony with global concerns and initiatives, introduced measures to encourage recourse to non-conventional resources for energy generation and consumption. At the initiative of the Union of India, the 1st respondent promoted the Non-Conventional Energy Development Corporation of A.P (NEDCAP). NEDCAP identified power generation employing biomass as an effective non-conventional measure.

<u>According to the petitioner</u> :-

A) NEDCAP conducted a survey in the State to identify potential areas in several districts within the State where non-conventional power generating plants could be set up. For this purpose NEDCAP took into account several factors like raw material availability, local power requirement, proximity of the location to the State or the National Grid, availability of water and the like.

B) During its survey NEDCAP identified Mahabubnagar District as a potential location for establishment of two 6

MW power plants which could generate power employing biomass. Applications were invited from private entrepreneurs like the petitioner "for expression of interest" to set up such plants. In response the petitioner Company applied on 18.02.2002 to NEDCAP to set up one 6 MW capacity biomass power plant to be located at Beechpalli, Itkyal Mandal, Mahabubnagar District. NEDCAP by its letter dated 05.03.2002 accorded permission to the petitioner to set up the power plant. An agreement was thereafter entered into between the petitioner and NEDCAP on 07.03.2002 incorporating a term (Clause.7) that a Power Purchase Agreement (PPA) shall be entered into between the petitioner and the concerned licensee.

C) At this point in time the concerned licensee was the Transmission Corporation of Andhra Pradesh – the APTRANSCO. The 2nd respondent is the successor of APTRANSCO. On 22.09.2003 a Power Purchase Agreement (PPA) was entered into between the petitioner and the APTRANSCO under which out of the total 6 MW of power to be generated by the petitioner, about 0.48 MW could be used by the petitioner for its internal consumption and the balance 5.52 MW would be purchased by the APTRANSCO through the Grid.

D) On the basis of the above PPA the petitioner raised equity and also obtained credit from a nationalized bank, to an extent of Rs.2.56 crores. It established a power generating plant in accordance with the rules and guidelines by the Union of India and the State of A.P. The plant is now ready to be commissioned.

E) By its letter dated 20.03.2006 the petitioner requested the 2nd respondent to provide the necessary electrical energy "back power" required to charge its plant, as per Cl.3.6, Art.3 of the PPA so as to commence its operations.

F) However the 3rd respondent by a letter dated 03.03.2006 (but signed on 01.04.2006), called upon the petitioner to communicate its willingness for *"tariff negotiations"* and *"signing of modifications to the PPA as approved by COMMISSION"*. The 3rd respondent's letter was silent and unresponsive to the petitioner's request for supply of back power.

G) According to the provisions of Art.2, Cl.2.2 the petitioner was entitled to be paid (for the power supplied to the 2nd respondent) the tariff for the energy so delivered at the inter-connection point for sale as applicable on the date of commercial operation subject to review of the prices by the Andhra Pradesh Electricity Regulatory Commission (The Commission) from time to time. The 2nd respondent is thus obligated to purchase the power generated by the petitioner at the rate prevalent as on the date of commercial operation. Commercial operations could have occurred in April 2006 if the 2nd respondent had supplied back power as per the request and requisition of the petitioner.

H) The Commission did suggest a few modifications to the PPA and the petitioner conveyed its acceptance in principle of these modifications. However, the petitioner company, at no point of time, had ever objected to a

discussion or agreeing to the modification to the said agreement.

I) The conduct of the respondents in failing to supply electrical energy to the petitioner is arbitrary. As time was of the essence, in response to the 3rd respondent's communication dated 03.03.2006 the petitioner conveyed its willingness to discuss the issues pertaining to modifications in the PPA and requested the 2nd respondent to intimate a suitable date for the purpose. The 3rd respondent by its letter dated 06.05.2006 scheduled 08.05.2006 as the date for negotiation. At the meeting held in the 3rd respondent's office on 08.05.2006 the 3rd respondent stated that the 2nd respondent would not be interested in purchasing power from the petitioner unless the petitioner agreed to a price of Rs.2.60 ps per unit. The petitioner's efforts to reason out with the respondents 2 and 3 were of no avail. The petitioner also pointed out at the meeting that the other 38 companies generating power through biomass were being paid a much higher rate at Rs.3.30 ps per unit and the petitioner cannot be discriminated. The 2nd respondent continued to avoid supplying back power.

J) The PPA between the petitioner and the APTRANSCO is binding on the 2nd respondent as the successor-in-interest of the APTRANSCO (vide G.O.Ms.No. 58 dated 7.6.2005) and the terms of such agreement also obligate the 2nd respondent to purchase the power to be delivered by the petitioner in accordance with the terms of the agreement.

K) Under Art.2.1 of the PPA the energy that is delivered at the inter connection point for sale to the APTRANSCO, will be purchased at the tariff provided in Art. 2.2 from and after the date of commercial operations of the Company. Art.2.2 of the PPA provided that the Company shall be paid tariff for the energy delivered, at rates as are applicable on the date of commercial production. Art.3.6 enjoins supply of energy to the company for any purpose at tariff rates as are applicable from time to time to the category of consumers to which the petitioner belongs, prior to the date of commercial production. Art.6.2(i) contains an undertaking by the APTRANSCO to make all efforts for evacuation of power.

L) The petitioner's request for back power ought to have been complied with by the 2nd respondent both in terms of the PPA as well as Sec.43 of the 2003 Act. However, the 2nd respondent invited the petitioner for negotiations contrary to the PPA and without any basis. In any event there was no occasion or justification for refusing supply of 'back power'. Without prejudice to the above, the respondents and in particular the 2nd respondent, is obligated to pay the petitioner a price for the power supplied by the petitioner which is equal to what is paid to similarly situated Companies i.e., those generating power using Bio-mass as the combustible fuel.

M) Even if the revised tariff plan fixed by the Commission in 2004 (currently under challenge elsewhere and by those effected thereby) is made applicable to the petitioner, the 2nd respondent is required to purchase power at the rate

of Rs.3.01 ps per unit (para-29 of the writ petition).

N) The conduct of the respondents in withholding supply of back power and insisting that the petitioner negotiate the price, constitutes coercion to wriggle out of the PPA.

Respondents case in brief :-

1st Respondent's counter dated 17.10.2006:

A) It is admitted that the State and Central Governments are anxious to promote non-conventional energy (NCE) projects. For this purpose G.O.Ms. Nos. 93 and 112 dated 18.11.1997 and 22.12.1998 were issued. In G.O.Ms. No. 93 the Central Government issued guidelines for promotional and fiscal incentives to be given by the State for power generation from NCE sources. The incentives were revised from time to time. In G.O.Ms.No.93 uniform incentives to all projects based on renewable sources of energy such as wind, biomass, cogeneration, municipal waste and mini Hydal were stipulated.

B) Subsequently, in G.O.Ms. No.112 amendments to the incentives provided in G.O.Ms.No.93 were issued.

C) Thereafter under the A.P Electricity Reform Act 1998 ('the 1998 Act') the Commission was constituted, commenced functioning from 3.4.1999 and was vested the power (including u/Sec.86 of the Electricity Act 2003 ('the 2003 Act')] to promote generation of electricity from renewable sources of energy, to determine tariff for power supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State and to regulate electricity purchase and

procurement process of distribution licensees including the price at which electricity shall be procured from generating companies, licensees or from other sources through agreements for purchase for power for distribution and supply within the State. Since the matter is now under the purview of the Commission under the provisions of the 1998 Act and as the Government orders in G.O.Ms. Nos. 93 and 112 have lapsed on account of passage of time, the Government did not issue any order of tariff fixation.

D) The Commission by its order dated 6.3.2000 and a subsequent order dated 20.6.2001 in OP No. 1075/00 considered and reviewed the earlier orders of the State Government and continued the incentives given to NCE projects, till March subject to review thereafter. In its tariff order dated 20.03.2004 in RP No. 84/03 in OP No.1075/00, the Commission rationalized the tariff for NCE projects. According to this rationalization incentives except 3rd party sale for some developers, were continued for this year thus enabling NCE projects already established to sustain in the State.

E) Though u/Sec.108 of the 2003 Act the State Government is authorized to issue policy directives to the Commission, the State has not issued any directives.

F) NEDCAP has no power to fix the tariff nor issue any directives. It is not a statutory authority. It is merely an agency set up by the State to deal with initial and start up matters like drawing up memoranda of understanding.

G) U/Sec.21 of the 1998 Act an agreement relating to any transaction of the nature described in sub-sections (1) to (4) unless made with or subject to the consent of the

Commission, shall be void. There is no absolute freedom to contract.

H) The Government issued orders in G.O.Ms.No.5 dated 11.1.2001 appointing the Superintending Engineer/TL&SS and Divisional Engineer/TL&SS working in the APTRANSCO to function as Electrical Inspectors in the specified operation areas under their notified jurisdiction and to exercise powers and perform the functions of Electrical Inspectors with respect to captive generating plants or generating stations being established by independent power purchasers and power projects based on NCE sources. Under Rule 47A of the Indian Electricity Rules 1956 ('the Rules') an independent power purchaser is required to issue a 30 days notice of the intention to commission the plant, to the supplier as well as the Inspector.

I) For extending back up power to a generating plant the provisions of Rules 47A and 63(1) of the Rules will have to be complied with. A contract for power purchase will have to be negotiated and an agreement entered into with the concerned DISCOM. The petitioner has therefore no legal basis for the reliefs claimed.

There are several other counter affidavits. On behalf of the respondents 2 and 3 the Chief General Manager, APCPDCL has field a counter on 17.7.2006. Again on 30.08.2006 another officer describing himself as the Chief General Manager, APCPDCL, filed a counter affidavit in WPMP Nos. 22584 and 23137 of 2006. Yet another counter was filed by another officer also describing himself as the Chief General Manager, APCPDCL, on 26.10.2006.

A memo of written submissions was filed on 16.10.2006

on behalf of the respondents 2,3 and 5 and was urged to be a compendium of the case of the respondents. In this document the broad contours of the defence to the writ petition are set out. The critical components of the submissions are :

(A) The 1998 Act was enacted pursuant to the Central Legislation – The Electricity Regulatory Commissions' Act 1998. The Central Act provided for the setting up of a Central Electricity Regulatory Commission and the various State Regulatory Commissions. The AP State Electricity Board ('APSEB') constituted u/Sec. 5 of the Electricity (Supply) Act 1948 entrusted with the functions of generating and supplying electricity to the consumers in the State, was divested of its functions. Other agencies were created for this purpose. U/Sec.13 of the 1998 Act the APTRANSCO was constituted. Under the first transfer scheme all assets of the APSEB were transferred to the State Government, which in turn transferred the assets relating to generation to a wholly owned Government Company – the APGENCO. The assets relating to distribution of electricity were transferred to another Government Company – the APTRANSCO. Some assets were retained with the State.

(B) Neither the APTRANSCO nor the APGENCO are the successors-in-interest to the APSEB.

(C) With the coming into force of the 2003 Act, the Electricity (Supply) Act 1948 and the Indian Electricity Act 1910 were repealed. However, in view of the provisions of Sec. 185(3) of the Electricity Act 2003, the provisions of the 1998 Act not inconsistent with the provisions of the 2003 Act, would apply to the State of

Andhra Pradesh.

(D) Four distribution companies wholly State owned were constituted for four different regions in the State, hereinafter referred to as the 'DISCOMS'. The DISCOMS were entrusted with the distribution of electricity in the respective territories in the State. After 10.06.2005 the APTRANSCO became a mere transmission licensee.

(E) The contracts entered into with the APTRANSCO and in force when the DISCOMS came into existence are not binding on the DISCOMS. This is so since the concerned DISCOMS may not need the entire power agreed to be purchased from any generating company. The 3rd transfer scheme vide G.O.Ms.No. 58 dated 7.6.2005 provided for allocation and sharing of the PPA's. This arrangement requires fresh contracts between different DISCOMS and the generating companies; different quantities of energy may be required to be purchased at the tariff fixed by the Commission which is the agency exclusively authorised to determine the tariff in accordance with the principles enacted in Sec.62 of the Electricity Act 2003. The PPAs already entered into by the generating company with the APTRANSCO are not therefore conclusive and operative. The PPA is valid only if it is approved by the Commission and would come into existence only after a draft agreement is placed before it; is duly approved by it; and thereafter a contract is entered into.

(F) The writ petitioner entered into a PPA dated 22.9.2003 with the APTRANSCO agreeing for a particular tariff and for a particular period. This PPA was not approved by

the Commission in *toto*. The Commission suggested modifications and instructed the parties to incorporate specified amendments. Under the 1998 Act or the 2003 Act there is no scope for a partial or conditional consent by the Commission.

(G) After instituting the writ petition, the petitioner forwarded an agreement purporting to be amendments to the agreement entered into with the APTRANSCO. This agreement was signed only by the petitioner but not by the APTRANSCO or the APCPDCL. As the APTRANSCO ceased to be in existence, the agreement was returned to the petitioner. The petitioner failed to address the Commission requesting for approval. The petitioner thus had an incomplete agreement with the APTRANSCO, not wholly approved by the Commission. The consent of the Commission as required u/Sec. 21(4) of the 1998 Act cannot be assumed to have been given to the PPA, in the circumstances.

(H) Thus, there is no effective or operative PPA. The generating companies which were already supplying energy were being paid tariff under the contract approved by the Commission. Since that stage was not reached in so far as the petitioner is concerned and the petitioner is yet to generate and supply power to the concerned DISCOM, the question of making payment on par with other existing generating companies does not arise.

(I) In the above circumstances the petitioner was addressed to communicate willingness for negotiation of tariff and for modifications to the PPA. There was no lawful agreement in place with the APTRANSCO by the

time the third transfer scheme was issued (in GOMS No.58, dt 7.6.2005) and therefore the petitioner has no right against the 2nd respondent.

(J) Regarding the petitioner's claim for supply of back power, Art. 3.6 of the PPA deals with supply of power during the period of construction of the power plant. Under Art.3.6 there is no obligation to supply back power for testing and trial run of the plant. Supply of power for construction of power plant and other activities was already made at the request of the petitioner. Supply of back power for testing and trial run would arise only after the inspection of all electrical installations by the Electrical Inspector appointed and authorised by the State Government. Rule 63 of the Indian Electricity Rules 1956 ('the 1956 Rules') enjoins that all electrical installations should be charged with supply only after due inspection by the Electrical Inspector. In any event there is no valid PPA approved by the Commission which enjoins an obligation to supply power by the 2nd respondent to the petitioner.

(K) The principles of estoppel are not attracted. No representation or promise has been made by the 2nd respondent to justify the plea of estoppel.

(L) Under the 2003 Act the petitioner can always opt for open access. The petitioner was never offered the price of Rs.2.60 ps per unit. While the 2nd respondent is prepared to offer a price which would ensure a reasonable profit, the petitioner is insisting on payment of Rs.3.30 per unit. There is no question of discrimination either. Recently the EPDCL, another DISCOM entered into a PPA with Nav Bharat Ferro

Allies Ltd, (a Bagasse Power Plant) to purchase power at Rs.2.70 ps per unit. The DISCOMs are required to agree to a tariff that would not unduly burden the consumers. The interests of the public are paramount.

(M) The petitioner must pursue the available alternative remedy. The petitioner is a generating company as defined in Sec.2(28) of the Electricity Act 2003. The 2nd respondent is a licensee. U/Sec.86(1)(f), the Commission is empowered to adjudicate disputes between generating companies and licensees. The petitioner has thus an alternative remedy.

Analyses of the case in the context of the competing positions:

On 22-09-2003 a Power Purchase Agreement (herein after called as 'PPA') was entered into between the petitioner and the APTRANSCO. Clause.6 of this agreement stipulates that it is enforceable subject to obtaining the consent of the Commission as per Sec.21 of the 1998 Act.

As per Article.2 of the PPA the petitioner shall be paid tariff for the energy delivered at the interconnection point for sale as applicable as on the date of the commercial operation subject to review of the prices by the Commission from time to time. However there will also be a special review of purchase price on completion of ten years from the date of commissioning of the project, at which point the purchase price will be reviewed on the basis of return on the equity-O&M expenses and the variable cost.

Clause.3.6 in Article.3 of the PPA (dealing with interconnection facilities) stipulates that during the period prior to the commercial operation date, on the request of the petitioner the APTRANSCO will supply energy to the project for

any purpose on the terms and conditions and at the tariff rates that are applicable from time to time to the category of consumers of the APTRANSCO to which the petitioner belongs.

By its letter bearing reference No.APERC/Dir-Engg/DD-Trans/F-PPAs/D.No.2940/2003, dated.31-12-2003 the Commission accorded consent under Section.21 of the Reforms Act,1998 to the PPA between the petitioner and the APTRANSCO subject to the specified modifications. The modifications specified are:

1. *The Explanation 2 in the Article 1.4 of the Agreement be amended in all agreements as per the Commission's letter (2) cited above.*
2. *The Preamble and Schedule 1 of the agreement for the power projects having captive consumption provisions, be amended as per the standard PPA approved by the Commission by letter dated.03-04-2003, wherein following provision exists*
   "Proposed captive consumption can be reduced by the company and additional surplus power can be sold to the APTRANSCO in case of exigencies or otherwise".

The Commission also directed that the amended agreement be submitted to it for record.

Issue A – Is there a consent to the PPA by the Commission:

According to Sri T.Ananta Babu the learned Senior Counsel for respondents, the Commission's letter dated.31-12-2003 cannot be considered to be a consent by the Commission to the PPA, under Section.21(4)(b) of the Reforms Act,1998. It is a conditional consent. It is only a partial approval/consent.

The above submission does not commend acceptance. Clearly the Commission communicated its consent under Sec.21(4) but subject to the amendments directed. According to these amendments explanation.2 in Article.1.4 of the PPA has

been amended in all agreements as per the Commission's letter dated.15-11-2003. Also the preamble and the first schedule of the PPA in the power projects having captive consumption provisions is amended as per the standard PPA approved by the Commission by its letter dated.05-04-2003 where under there is a provision that the proposed captive consumption can be reduced by the generating company and additional surplus power can be sold to the APTRANSCO in case of exigencies or otherwise.

On a holistic, true and fair analysis of the Commission's letter dated.31-12-2003 the conclusion is irresistible that the PPA was granted consent with the amendments ordered by the Commission itself. The only requirement was a procedural one namely that the amended agreement be submitted to the Commission for record. Thus the PPA between the petitioner and the APTRANSCO was accorded consent by the Commission with the amendments as directed by the Commission.

The APTRANSCO did not challenge the consent accorded by the Commission. There is thus, in the considered view of this Court an operative power purchase agreement between the petitioner and the APTRANSCO which has been duly approved and accorded consent by the Commission in terms of Sec.21(4) of the 1998 Act.

It is the factual position admitted by the respondents (vide written submissions at page-4) that the writ petitioner sent an agreement incorporating all the amendments to the PPA signed by itself. The respondents state that the agreement was signed only by the petitioner and not by the APTRANSCO or DISCOM. The respondents contend that as the APCPDCL is not the successor-in-interest to an "incomplete agreement", no request

was made to the Commission for its approval. The respondents contend that there is only an incomplete agreement with the APTRANSCO which has not been approved by the Commission and therefore the consent of the Commission as envisaged by Sec. 21(4) of the 1998 Act cannot be assumed to have been given. The respondents also contend that the Commission had merely suggested certain amendments to the PPA but had not given unconditional consent to the PPA.

The letter of the Commission dated 31.12.2003 addressed to the Chairman & Managing Director, APTRANSCO, is very clear. The letter in terms states: *"APTRANSCO submitted Power Purchase Agreement entered into with Bio-mass Power Project Developers as listed below for consent of the Commission. … … … In this connection I am directed to communicate the Commission's consent u/Ss. 21(4), APER Act, 1998 to the above Power Purchase Agreements subject to the following modification. …"*(emphasis added)

The petitioner is one of the Bio-mass Power Project Developers whose PPA dated 22.9.2003 with the APTRANSCO was taken up for consent by the Commission and in respect of which the Commission's consent as above was granted.

Even after the Commission's letter dated 31.12.2003 it requires to be noticed that the Superintending Engineer, APCPDCL (Operations), Mahaboobnagar, by letter dated 6.3.2006 had addressed the petitioner informing that approval has been accorded for taking up certain works towards execution of the project. Certain drawing were found to be satisfactory in another letter of the same authority dated 21.3.2006.

The Chief General Manager (Comml&RAC), APCPDCL

had addressed the petitioner on 3.3.2006 stating that it was learnt that the Commission had issued consent to the PPA subject to certain modifications to the articles in the PPA and the Commission had approved the amendment to the other articles of the PPA format; the modifications directed by the Commission are yet to be implemented to the PPA: as per the 3rd transfer scheme issued by the State under the provisions of the 2003 Act, the APCPDCL may engage in the business of trading of electricity and power purchase agreement hitherto handled by the APTRANSCO; as per the extant orders of the Commission for procurement of power by the APCPDCL from the NCE projects the tariff is to be negotiated; and therefore the petitioner should communicate willingness for tariff negotiation and signing of modifications to the PPA as approved by the Commission in the consent letter and other amendments issued from time to time.

From the letter dated 3.3.2006 of the APCPDCL it is apparent that the consent issued by the Commission subject to the amendments directed has been employed as a leverage by the APCPDCL to renegotiate the tariff, which was already agreed upon in the PPA. The APCPDCL in its letter conveyed its intention that it would sign the modifications to the PPA as directed by the Commission on the petitioner's communicating willingness for a tariff negotiation.

In the considered view of this court this conduct of the respondents is clearly arbitrary. As analyzed earlier, the Commission had clearly accorded its consent and along therewith has directed amendments. In the context of the provisions of the 1998 Act and the requirement (u/Sec.21(4) of that Act), that every Power Purchase Agreement should receive the consent of the Commission, the relevant roles of the parties

to a PPA and the agreement must be understood.

The Commission is not a party to a PPA. The functions of the Commission under the provisions of the 1998 Act are inter alia to regulate the purchase, distribution, supply and utilization of electricity, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplies are adequately levied and duly collected; to promote competitiveness and to progressively involve the participation of the private sector while ensuring a fair deal to the customer; and to regulate working of licensees and promote their working in an efficient, economical and equitable manner (Sec.11).

In order to effectuate the oversight and regulatory powers of the Commission consistent with the functions enjoined upon it under the provisions of the 1998 Act and in the light of the statutory prescription [Sec.21(4)] that arrangement for the purchase of electricity from a generating company must be with the consent of the Commission, the Commission was approached for its consent to the PPA. The Commission by its letter dated 31.12.2003 has clearly granted its consent with a direction to incorporate amendments. It is not the case of the respondents that the amendments directed by the Commission relate to the tariff for the energy to be supplied by the petitioner to the APTRANSCO or its successor-in-interest, the 2nd respondent. None of the respondents or the APTRANSCO were aggrieved by the modifications directed by the Commission. It is on record and admitted by the respondents that the petitioner had sent up an agreement signed by it incorporating amendments to the PPA as directed by the Commission.

In the totality of circumstances above the respondents are under a legal obligation to honour the PPA since the consent of the Commission is neither partial nor conditional. In all fairness the 2nd respondent ought to have forwarded the amendments signed and sent by the petitioner with its signature to the Commission for its record as directed in the Commission's letter dated 31.12.2003.

If the APTRANSCO or the respondents wanted to resile from the PPA they should have pursued appropriate steps for rescinding the PPA (if such course of action were available). Having failed to challenge the consent granted by the Commission together with the modifications directed by it, the respondents cannot gainfully contend that they are not bound by it, on the contrived ground that the Commission's consent was partial or conditional. This court is unable to accept the stance of the respondents that consequent on the amendments directed to be incorporated in the PPA by the Commission, the parties were free to start the process of entering into a PPA afresh, renegotiating the terms therein including terms relating to tariff. It was open to the respondents or the APTRANSCO earlier, to have urged before the Commission that the tariff enumerated in the PPA was unfair or inconsistent with the interests of the consumers and that in view of the provisions of Sec.11(e) the Commission (consistent with the statutory norms guiding its functions as set out in the aforesaid provision), ought not to accord consent or ought to stipulate or direct a different tariff regime. This was not done. There was no dispute on the tariff as agreed upon between the parties in the PPA.

The PPA with the tariff terms incorporated therein was agreed to and signed by both the parties – the petitioner and the APTRANSCO. The Commission accorded its consent but with

certain amendments, amendments in relation to areas other than tariff. In the context, the parties to the PPA are bound to perform as per the PPA entered into between them but subject to the amendments directed by the Commission. It is not the case of the respondents that the amendments incorporated to the PPA, signed by the petitioner and forwarded to the 3rd respondent under the covering letter of the petitioner dated 25.7.2006 are at variance or inconsistent with the amendments directed by the Commission.

On the above analyses this Court holds that there is a valid, operative and enforceable PPA between the petitioner and the APTRANSCO, duly consented to by the Commission. The Commissions directive in its letter dated.31-12-2003(to incorporate amendments) does not amount to a partial/conditional consent. This directive is binding on the parties and the petitioner has complied with this directive of the Commission by incorporating amendments to the PPA as directed by the Commission and forwarding the same to the APCPDCL.

The respondents urge that the contract (PPAs) entered into with the APTRANSCO and which were in force when the DISCOMS came into existence are not binding on the DISCOMS. According to the respondents, the concerned DISCOMS may not need the entire power agreed to be purchased from any generating company and the 3rd transfer scheme vide G.O.Ms.No.58 dated.07-06-2005 requires fresh contracts to be entered into between the different DISCOMS and the generating companies since different quantities of energy may be required to be purchased at the tariff fixed by the Commission, which is the authority exclusively authorized to determine the tariff in accordance with the principles enacted in

Sec.62 of the 2003 Act. According to the respondents the PPAs between the petitioner and the APTRANSCO are also not conclusive and operative.

It requires to be noticed that in response to the petitioner's letter dated 25.7.2006 (forwarding amendments to the PPA as directed by the Commission in its consent letter dated 31.12.2003), the 3rd respondent addressed a letter dated 13.10.2006 to the petitioner stating that as the Commission had not approved the PPA it is void; the law does not contemplate a partial or conditional approval; at present the APTRANSCO is prohibited from trading in electricity; there is no question of the DISCOMs succeeding to a void agreement; and that the question of amending a void agreement does not arise.

In the light of the analysis hereinbefore, the PPA dated 22.9.2003 between the petitioner and the APTRANSCO has not become void nor the clear and unequivocal consent granted by the Commission become inoperative on account of the amendments directed by the Commission in its letter granting consent. The Commission when it directed amendments to the PPA was not renegotiating the PPA as though it was a party to the PPA. As the regulatory agency with oversight functions under the provisions of the 1998 Act, the Commission having due regard to its functions u/Sec.11 of the Act and after scrutinizing the PPA in all its aspects accorded consent to the agreement between the parties and mandated certain amendments as spelt out in its letter of consent. If any party were aggrieved by the amendments directed, they were at liberty to pursue appropriate remedies against the order of the Commission in so far as the amendments directed. Having failed to challenge the Commission's directive to incorporate amendments while granting consent, it is not open to the

respondents to contend that the PPA between them is wholly effaced or obliterated on account of the Commission directing amendments while according its consent.

It also requires to be noticed that the 2003 Act, while repealing *inter alia* the provisions of the 1998 Act, has nevertheless enjoined that the provisions of the said Act, not inconsistent with the provisions of the 2003 Act shall apply to the States in which such enactments are applicable (Sec. 185(3) of the 2003 Act).

In the considered view of the Court, the consent given by the Commission to the PPA together with the amendments directed, is a regular consent, in operation *proprio vigore* and the PPA dated 22.9.2003 between the petitioner and the APTRANSCO is neither void nor inoperative.

ISSUE B – Is the APCPDCL the successor – in – interest of the APTRANSCO and is it bound by the PPA dated 22-09-2003 ?:

The respondents also contend that the APCPDCL is not the successor-in-interest of the APTRANSCO and is therefore not obliged to perform the obligations of the APTRANSCO under the PPA dated 22.9.2003 between the petitioner and the APTRANSCO.

The 1998 Act has received the assent of the President of India on 21.10.1998 and was brought into force with effect from 1.2.1999. The Commission was constituted on 3.4.1999 and continues to function by virtue of the savings clause in Sec.185(3) of the 2003 Act. One of the objects of the 1998 Act is rationalization of the generation, transmission, distribution and supply of electricity; and enabling avenues for participation of the private sector in the electricity industry. To effectuate this object Sec.23 of the 1998 Act enables reorganization of the erstwhile APSEB. This provision *inter alia* enables a transfer

scheme to be prepared by the State Government to give effect to the objects and purposes of the Act w.e.f., the date on which the transfer scheme is published or such further date as may be prescribed by the State Government. From such effective date any property, interest in property, rights and liabilities which immediately before the effective date belong to the Board shall vest in the State Government on such terms as may be agreed upon between the State Government and the Board [Sec. 21(3)]. Sub-sec(2) enacts that any property, interest in property, rights and liabilities vested in the State under sub-sec.(1) shall be revested by the State in the APTRANSCO and generating company or companies in accordance with the transfer scheme. Sub-sec.(5) enables the State Government, after consulting the APTRANSCO, to require it to draw up a transfer scheme to vest in a further licensee any of the functions including distribution, property, interest in property, rights and liabilities which have vested in the APTRANSCO. Such further transfer scheme on notification is to have the same effect as the transfer scheme u/Sub-sec.(2). Such subsequent transfer scheme [Sec. 23(6)] may *inter alia* provide that any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee.

Exercising the available power u/Sec.23 of the 1998 Act, the State Government in G.O.Ms.No. 58 dated 7.6.2005 (published in the AP Gazette dated 9.6.2005), directed the transfer *inter alia* of the PPAs from the APTRANSCO to the specified distribution companies (DISCOMs), including the APCPDCL. This transfer scheme clearly provides:

> "The rights and obligations and agreements and contracts relating to procurement and bulk supply of electricity or trading of electricity to which APTRANSCO was originally a party shall stand transferred and vested in the APCPDCL, APEPDCL, APSPDCL and APNPDCL respectively w.e.f.

9.6.2005."

Qua the third transfer scheme (G.O.Ms. No.58) the 2nd respondent is one of the transferee of the rights and obligations and agreements and contracts with the APTRANSCO. Clause (3) of the transfer scheme reiterates the rights and obligations of the four distribution companies in relation to the obligations and entitlement of the APTRANSCO, as successors in interest. Clause (6) of G.O.Ms. No.58 (3rd transfer scheme) is relevant and reads as under:

> " Subject to the AP Act, EA, 2003, the Order and the Third Transfer Scheme, upon the transfer of contracts deeds, schemes, bonds, agreements and other instruments of whatever nature to the APDISCOMs, the respective Transferee APDISCOM shall replace APTRANSCO in all respects with regard to such Bulk Supply Undertakings. All parties to such contracts, deeds, schemes, bond, agreements and other instruments shall execute such other or further document or documents and / or take such steps, as may be necessary and / or incidental thereto, in order to give full and complete effect to such transfer of contracts, deeds, schemes, bonds, agreements and other instruments of whatever nature to the APDISCOMs."

Under G.O.Ms.No.58, the petitioner is one of the undertakings allotted to the APCPDCL and described as a NCE yet to be commissioned.

The APCPDCL is clearly therefore the ordained successor-in-interest of the APTRANSCO in so far as the rights and obligations under the PPA dated 22.9.2003 between APTRANSCO and the petitioner is concerned. The contention to the contrary urged on behalf of the respondents is wholly misconceived, without a legal basis and is rejected.

ISSUE.C – Is there are obligation on the 2nd respondent to supply back power ?:

On 20-03–2006 the petitioner addressed the concerned official of the 2nd respondent requesting supply of power for commissioning of the project. The petitioner stated that the construction work is in progress and shortly nearing commissioning stage and therefore the addressee must intimate the petitioner the procedures to be adopted and the tariff payable as per the statutory regulations. The addressee (the Director, Commercial of the 2nd respondent) was requested to issue necessary instructions to conduct the necessary checks to extend power supply after satisfactory inspection.

In response to the above letter the Chief General Manager of the 2nd respondent addressed the petitioner stating that as per the third transfer scheme (G.O.Ms.No.58) and as per the prevailing orders of the Commission the tariff is to be negotiated and therefore the petitioner should communicate its willingness for tariff negotiations and signing of modifications to the PPA as approved by the Commission in its consent letter.

The petitioner addressed another letter to the Chief General Manager of the 2nd respondent indicating its willingness to discuss the issue relating to modifications to the PPA and requesting that since the erection work of the plant is completed and is awaiting the charging of the 8 MVA generator transformer from Bichpally sub-station for equipment and trial runs, power be supplied to the said transformer. On 29-05-2006 the petitioner addressed the 2nd respondent reiterating the request for back power for the purpose of commissioning the plant. There being no response the writ petition is filed.

The defence of the respondents as set out in the written submissions (with regard to supply of back power) is that Article.3.6 of the PPA only relates to supply of power during

construction period but is inapplicable to release of power for testing and trial run of the plant. According to the respondents, release of back power for testing and trial run is an independent issue and could be done only after the mandatory requirement of inspection of electrical installation by the Electrical Inspector, appointing and authorized by State Government is satisfactorily completed.

The respondents contend that under Rule.63 and 65 of the Indian Electricity Rules, 1956 (the 1956 Rules) all electrical installations should be charged with supply only after the Electrical Inspector is satisfied after inspection. Rules.63 and 65 of the 1956 Rules set out the requirement and procedures for approval by the Electrical Inspector.

The stand of the respondents is misconceived. In its letter dated.20-03-2006, the petitioner specifically requested the 2nd respondent to intimate the procedures to be adopted and the tariff to be paid as per the statutory regulations for supply of back power and also requested for instructions to the concerned to conduct necessary checks for releasing power for the purpose. It is not the case of the petitioner that the 2nd respondent should release power in any event and without complying with the necessary statutory regulations that govern the release of power for such purposes. It requires to be noticed that in its letter dated.03-03-2006 the 2nd respondent did not adopt the position that power would be supplied after the necessary tests or the technical verification of the petitioners' plant and equipment. On the other hand, it is the case of the 2nd respondent as per the letter dated.03-03-2006 that the petitioner should come forward for negotiation of the tariff and should communicate its willingness for tariff negotiation. The letter

dated.03-03-2006 by the 2nd respondent was specifically in response to the petitioner's letter dated.20-03-2006 seeking release of back power. From the above correspondence it is clear that the 2nd respondent was refusing to supply back power until the petitioner renegotiated the tariff terms agreed upon in the PPA and consented to by the Commission. The contentions in the several counter-affidavits and in the written submissions that back power cannot be released without compliance with the relevant statutory rules as to the requirement of testing and verification, is thus seen to be a mischievous and misleading pleading and defence.

It is clear from the chronology of correspondence that the 2nd respondent was unwilling to supply back power as a coercive leverage to browbeat the petitioner to agree for a renegotiation of the tariff which was already agreed upon in the PPA which also received the assent of the Commission. The amendments directed by the Commission to the PPA after according consent do not relate to the tariff.

Clause (Article)3.6 of the PPA reads as under:

> "During the period prior to the Commercial Operation Date, on the request of the Company, the APTRANSCO will supply energy to the Project for any purpose, on the Terms and Conditions and at the tariff rates that are applicable from time to time to the category of consumers of the APTRANSCO to which the Company belongs, provided separate metering arrangements as may be required under the Terms and Conditions of such tariff have been installed at the Project."

In terms, Clause: 3.6 of the PPA obligates the APTRANSCO (and the 2nd respondent as the successor-in-interest of the APTRANSCO) to supply energy to the petitioner's project for any purpose, during the period prior to the commercial operation date and on the request of the petitioner,

on the terms and conditions and at the tariff rates that are applicable from time to time to the category of consumers of the APTRANSCO (the 2nd respondent), to which the petitioner belongs. The expression "for any purpose" clearly includes the purpose of testing the plant and equipment for actual operations prior to the commissioning of the plant.

Rules 63 and 65 of the 1956 Rules shall have to be complied with in relation to the verification testing and satisfaction of the Electrical Inspector before the supply of power. This is but a procedural prescription, which requires the Electrical Inspector to inspect the plant and machinery of the petitioner to verify whether it is fit for supply of energy and in terms of Rules.63 and 65. In any event the 2nd respondent cannot insist that the petitioner should renegotiate the tariff as a condition precedent to supply of back power. The operational PPA duly consented to by the Commission does not permit such a posture by the 2nd respondent, nor do Rules 63 and 65 of the 1956 Rules require an agreement on the tariff being the condition precedent for performance of the testing and verifications functions by the Electrical Inspector, for supply of back power.

For the aforesaid reasons this Court holds that the 2nd respondent is under a legal obligation under clause.3.6 of the power purchase agreement to supply back power to the petitioner without insisting on tariff renegotiations. All procedural formalities particularly those relating to testing and verification of the petitioner's plant and equipment by the Electrical Inspector will however have to be complied with.

For the above purpose (i.e., supply of back power by the 2nd respondent), the respondents shall expeditiously and in any

event within 45 days from the date of receipt of a copy of this Order, depute the competent authority (Electrical Inspector) to the petitioner's plant, to inspect, assess and certify the suitability of the plant and equipment for supply of back power as well as for eventual commissioning of the plant to the inter-connection stage. The necessary formalities to be fulfilled and the charges and tariff to be paid by the petitioner for the inspection testing and certification of the plant and equipment by the Electrical Inspector and for supply of back power shall be intimated by the 2nd respondent to the petitioner, within 15 days from the date of receipt of a copy of this Order.

ISSUE NO. D : Is the 2nd respondent under a legal obligation to purchase the power supplied by the petitioner; and if so at what rate/tariff ?

Earlier in this judgment this Court concluded that there is an operative and effective power purchase agreement dated.22-09-2003 between the petitioner and the APTRANSCO. This Court also held that the 2nd respondent is the successor in interest to the APTRANSCO and has inherited all the rights and obligations of the APTRANSCO in relation to the PPA with the petitioner. This Court has duly noticed that the PPA was granted consent to by the Commission subject to specified amendments to the PPA. As neither the petitioner, the APTRANSCO nor the 2nd respondent had assailed the amendments to the PPA directed by the Commission and as the consent accorded by the Commission is not a partial or conditional consent, this Court also held that the PPA dated.22-09-2003 as modified by the amendments directed by the Commission through its consent letter dated.31-12-2003 are binding on the petitioner and the 2nd respondent as the

successor-in-interest of the APTRANSCO (under G.O.Ms.No.58, dated.07-06-2005).

Clause (Article) 2 of the PPA deals with the purchase of delivered energy and the tariff. Clause.2.2 reads as under:

> *"The Company shall be paid the Tariff for the energy delivered at the interconnection point for sale to APTRANSCO as applicable as on the date of Commercial Operation subject to the reviews of the prices by the COMMISSION from time to time. Not withstanding these reviews there will be a special review of purchase price on the completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O&M expenses and the Variable Cost"*

On a true and fair construction, this clause obligates the payment of the tariff by the 2nd respondent to the petitioner for the energy delivered at the interconnection point for sale, as applicable on the date of commercial operation subject to the review of the prices by the Commission from time to time.

According to the petitioner (para.30 of the writ petition) the phrase "as applicable" in clause.2.2 of the PPA connotes a uniform tariff plan that could encourage generation of power through renewable resources. According to the petitioner it is not a charter for a discriminatory tariff for each generating company.

Even in the matter of determination of tariff, the State Government, the A.P.S.E.B, the APTRANSCO (or now the 2nd respondent) being either the State or an instrumentality of the State cannot administer a discriminatory tariff regime. They are not relieved of the obligation under Article.14 of the Constitution. Uniform tariff is therefore the norm. *Prima facie* it would appear that, all N.C.E projects or at any rate projects generating

electricity with bio-mass as the combustible fuel should be treated as a homogeneous class for the purpose of tariff determination. The 2nd respondent cannot determine tariff at different rates for each generating company without enunciating generic principles for tariff determination. If the 2nd respondent wants to classify a generating company employing bio-mass for power generation into a distinct class from the general class of generating companies employing bio-mass, then the 2nd respondent should come out and plead rational distinctions between such generating companies as would justify and legitimise the determination of different tariffs for each such company. Else, the 2nd respondent would violate Article.14 and cannot do so being a State.

In para.30 of the writ petition the petitioner has pleaded:

> *" In this context, it would be relevant to submit that presently, the 2nd respondent is paying to those 38 companies an amount equivalent to the value of The rate per unit based on the Revised Tariff PLUS 50% of the difference between the rates based on the Old tariff plan and the new tariff plan, as per the directions of this Honourable Court in W.P.No.16621 of 2004 dated 15th June 2005. It is further submitted that as per this formula that is being paid, the petitioner company would be entitled to a price of Rs.3.51 Ps.(3.01 as per old tariff + 0.50 being the difference between the old and new tariffs) Therefore, it is crystal clear that the respondents are indulging in arm twisting tactics, firstly by delaying the supply of back power and secondly, insisting upon the petitioner to agree to be paid a lesser price for the electric energy likely to be supply by it. To say the least, it is unethical, illegal and plant arbitrariness."*

The respondents in particular the 2nd respondent neither in the several counter-affidavits nor in the written submissions

have pleaded any fact in rebuttal of the petitioner's assertions above. In any event tariff determination is neither within the province nor the expertise of this Court.

Hereinabove this Court has clarified that determination of the tariff to be paid to the petitioner by the 2nd respondent for the power supplied by the petitioner at the inter-connection point to the grid is an aspect, which is subject to and governed by the equality injunctions of the Constitution. This is an inviolable legal principle. Subject to this principle the respondents shall indicate to the petitioner the tariff that is payable for the power to be supplied by the petitioner. In case of any surviving disputes on this aspect, the aggrieved party is at liberty to pursue appropriate remedies including under Section. 86 of the Electricity Act, 2003.

In the result this issue is answered by holding that the 2nd respondent is under a legal obligation to purchase the power supplied by the petitioner in accordance with the PPA dated 22-09-2003 as amended by the Commission as per the directive contained in the letter of consent dated.31-12-2003 and at the tariff stipulated in clause/article.2.2 of the PPA and in case of ambiguity as to determination of the tariff as per clause.2.2 above, in accordance with the obligation of the 2nd respondent under Article.14 of the Constitution i.e., by paying to the petitioner the tariff at the rates that the 2nd respondent pays to similar generating companies which supply power to the 2nd respondent.

To sum up this court holds:

(A) That the Power Purchase Agreement dated 22.09.2003 between the petitioner and the APTRANSCO as amended/modified under the

directives of the AP Electricity Regulatory Commission, contained in its letter dated 31.12.2003, is a valid, operative and enforceable Power Purchase Agreement and has duly received the consent of the Commission as required by Sec. 21(4) of the AP Electricity Reforms Act 1998. The consent of the Commission is neither partial nor conditional;

(B) The 2nd respondent – the APCPDCL, is the successor-in-interest of the APTRANSCO in relation to the rights and obligations under the Power Purchase Agreement dated 22.09.2003 entered into between the petitioner and the APTRANSCO;

(C) In terms of Clause 3(6) of the Power Purchase Agreement dated 22.9.2003, the 2nd respondent is under an obligation to supply back power to the petitioner. In view of this obligation and coupled with the obligations under the PPA, the 2nd respondent or the respondents cannot insist that the petitioner should renegotiate the tariff already agreed upon in the Power Purchase Agreement dated 22.9.2003, but subject to the amendments to the Power Purchase Agreement directed in the AP Electricity Regulatory Commission's letter dated 31.12.2003. However the procedural formalities relating to inspection and testing of the petitioner's plant and equipment by the Electrical Inspector will have to be complied with; and

(D) The 2nd respondent is obligated to purchase the power supplied by the petitioner in accordance with the tariff terms as set out in Article/Clause 2.2 of the Power Purchase Agreement dated 22.9.2003 (as modified by the AP Electricity Regulation

Commission as per the directives contained in the letter of consent dated 31.12.2003).

In case of any doubt or ambiguity as to the determination of tariff as per Clause 2(2) of the Power Purchase Agreement, the tariff shall be payable at the rate paid to similarly (similar to the petitioner) circumstanced generating companies from whom the 2nd respondent is purchasing power, in view of Article 14 of the Constitution. Any resultant or emerging disputes between the petitioner and the 2nd respondent, in relation to the tariff payable by the 2nd respondent for the power supplied by the petitioner, may be pursued for resolution, by the aggrieved party before an appropriate forum including under Section 86 of the Electricity Act 2003.

Consequent on the conclusion-C above, the respondents are directed to expeditiously and in any event within 45 days from the date of receipt of a copy of this order, depute the appropriate authority (Electrical Inspector), to the petitioner's power plant to inspect, assess and certify the suitability of the plant and equipment for supply of back power and eventually for commissioning of the plant to the stage of inter-connection to the grid. The necessary formalities to be fulfilled and the charges and tariff to be paid by the petitioner for the inspection, testing and verification by the Electrical Inspector and for supply of back power shall be intimated to the petitioner by the 2nd respondent within 15 days from the date of receipt of a copy of this order.

The writ petition is allowed as above. There shall be no order as to costs.

Dt: -06-2007 ----------

Pvsn/Tsnr Justice G. Raghuram